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In The

Supreme Court of the United States

October Term, 1997

CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER and JACK HAMANN,

Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does the media engage in joint action in violation of the Fourth Amendment when the media conspire with a United States Department of Justice attorney and federal agents to enter private property and to film and to record private persons and conversations while federal agents execute a search warrant which does not authorize the presence or actions of the media?

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Paul W. Berger and Erma R. Berger (the "Bergers") respectfully submit their opposition to the Petition for Writ of Certiorari filed by Media petitioners Turner Broadcasting System, Inc. ("Turner"), Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Robert Rainey ("Rainey"), and Donald Hooper ("Hooper") (collectively the "Media").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 129 F.3d 505 and entitled *Berger v. Hanlon*. App. 1a. The decisions of the District Court are unreported. App. 27a, 49a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997, reversing in part and affirming and remanding in part, the District Court's dismissal of the Bergers' two related civil actions. The Media and Government defendant-appellees filed separate Petitions for Rehearing and Suggestion for Rehearing En Banc which were both denied on February 25, 1998.[1] App. 61a. The Media and Government filed Petitions for Writs of Certiorari which were both docketed on May 28, 1998. Justice Sandra Day O'Connor extended the time to oppose the Petitions until July 27, 1998. The Bergers filed a Conditional Cross-Petition to the Media Petition on June 29, 1998 pursuant to United States Supreme Court Rule 12.5. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] The Government petitioners are Assistant United States Attorney Kris McLean ("AUSA McLean"), United States Fish & Wildlife Service ("FWS") Speciai Agents Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell"), and Robert Prieksat ("Prieksat") (collectively the "Government Agents"). The Bergers have filed a separate Brief in Opposition to the Government Agents' Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fourth Amendments to the United States Constitution, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. I.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The Media seek to wield the First Amendment as a sword to violate the privacy of the people and as a shield to exempt themselves from liability for the unlawful methods they employ. The Ninth Circuit viewed both the written contract between the Media and Government Agents, and their actual conduct, in determining that the Media engaged in "state action" in violating the Bergers' constitutional right to privacy.

The search of the Berger Ranch in March 1993 was not an urban "ride along" to passively "observe" law enforcement doing public service as the Media characterizes their conduct in this case. CNN Petition ("CNN/P") [at page] 2-3, 24. The setting was an isolated private ranch several hours away from the city. The Media were not "properly exercising their professional functions" when they trespassed on the Berger Ranch. CNN/P 9. The Media were not present as a "watch dog" to protect the public against Government Agents' abuse of authority. CNN/P 25. Instead, the Media exploited the exclusive authority of Government Agents to intrude upon constitutionally protected privacy in executing federal search warrants. The Media's conduct did not simply intersect with

the Government Agents' conduct as the Media asserts. CNN/P 13. Their conduct was intertwined and indistinguishable from that of the Government Agents. This was state action. And the Bergers' rights were violated as a result. The record clearly shows that the Media's characterization of the facts is inaccurate and misleading.

This case raises the question of whether the Media should be excused for unlawful newsgathering practices when the Media and Government Agents enter a contract to confer mutual benefits upon each other for a story. This case is not, as the Media would have this Court believe, an attempt to abridge the freedom of the press, nor to determine when a reasonable search is rendered unreasonable. "A search warrant is simply not a press pass." *Hagler v. Philadelphia Newspapers*, 24 Media L. Rep. (BNA) 2332 (E.D. Pa. 1996). Review is unwarranted because the Ninth Circuit's decision applies settled law to the facts of this particular case and is not in conflict with Fourth and Eighth Circuit determinations that state action did not exist in other circumstances.

A. Factual Background

In early 1993, the Media contacted Special Agent Scrafford of the United States Fish and Wild Life Service and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation. ER 1:¶¶34-36, 37/A; ER 5/1; ER 2:¶1; ER 6:¶¶18-20; ER 5/7:36:5-25.[2] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings ("outtakes") which the Media intended to and did broadcast repeatedly worldwide on their various television

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[2] Citations are to the excerpts of record ("ER") filed by the Bergers in the CNN Appeal No. 96-35266, to the tab number within the ER and the exhibit number and/or page and/or paragraph number within the tab.

outlets. ER 1/A; ER 2/A; ER 5/1[3]; ER 1:¶¶34-40; ER 3:¶¶1, 18-24, 34-50, 68, 69. The Media, in turn, granted the Government Agents' express desire to publicize their efforts to enforce environmental laws. ER 5/1, 5/2, 5/8:T11:7-8.[4] *A week after the Agreement was executed*, a United States Magistrate Judge issued the search and seizure warrants at issue. The Magistrate Judge was not advised of the Agreement nor of the Media's intended participation. The Magistrate Judge did not authorize the Media presence, cameras and microphones. ER 5/3, 5/4; ER 1:¶¶47-48; ER 3:¶¶25-27. The search warrant only authorized a search by federal agents of "The Paul W. Berger Ranch with appurtenant structures, *excluding the residence*." (Emphasis added). ER 3:¶28; ER 4:¶7.[5]

By pre-arranged plan, the Media were an integral part of the Government Agents' convoy of vehicles when the search of the Berger Ranch commenced before dawn on March 24, 1993. ER 5/8:T6-T7:2. With the Government Agents' assistance, the Media video and audio taped the convoy both by a CNN camera shooting from inside a Government vehicle and

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[3] Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[4] Mr. Berger was under criminal investigation by AUSA McLean for allegedly killing federally-protected eagles as a result of lacing dead livestock carcasses with poison as a means of controlling predatory coyotes. ER 1:¶74; ER 3:¶32; ER 5/8:T11:2-4. References to "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." ER 5/8.

[5] The Media were also permitted by the Government Agents to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. ER 1:¶¶49-52; ER 3:¶¶29-33; ER 5/2, 5/8T1:3-4, T3:1-5, T:1-6. The Media were made privy to *confidential* information about the Bergers and the criminal investigation against Mr. Berger, including details about the *sealed* warrants and their execution.

by a CNN camera mounted on the exterior of a Government vehicle driven by Government Agents. ER 3:¶34; ER 5/8:T6:2-T7:2. Agents Scrafford also wore a concealed CNN microphone.

Media cameras were focused on Mr. Berger as he came upon the convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. ER 4:¶¶2-35/8:T7:2. Agent Scrafford told Mr. Berger a search warrant was about to be executed at his Ranch and that *the Court had ordered a search of every building; Agent Scrafford did not state that the residence was excluded*. ER 3:¶36; ER 4:¶¶4, 7; ER 5/8:T7:6. Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[6] Mr. Berger drove him as requested. ER 4:¶5; ER 5/8:T7:1-16. Agent Scrafford informed Mr. Berger that he would be imprisoned in Billings if he did not cooperate with the federal authorities. ER 8/8T:3. Mr. Berger was shaking and very upset. ER 4:¶17; ER 5/8:102:13-15.[7]

Mr. Berger was never informed that Agent Scrafford was the Media's human "boom mike." Agent Scrafford wore a hidden microphone installed by the Media to record secretly everything said solely for the Media's benefit. ER 3:¶37; ER 4:¶5-6. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. ER 3:¶¶37, 38, 41-42; ER 4:¶¶5, 8-13; ER

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[6] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had yet been brought against Mr. Berger at the time of the search. ER 5:¶8; ER 5/3, 5/4.

[7] At the time, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. ER 4:¶17.

5/8:T7:1-16. Mr. Berger was not even informed that the Government Agents had brought the media onto his property. ER 3:¶¶39, 40; ER 4:¶¶9, 14; ER 5/8:T7:1-16. Mr. Berger was never advised of any of his rights, including the right to remain silent. ER 3:¶¶39, 40; ER 4:¶¶9, 14; ER 5/8:T7:1-16.

Although the Berger residence was excluded from the search warrant, Agents Scrafford and Branzell entered the Bergers' home and brought the Media microphone inside.[8] Unbeknownst to the Bergers, their conversations were secretly and, admittedly, monitored and recorded by the Media through Agent Scrafford's hidden microphone. CNN/P 6; ER 3:¶48; ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T7:15-16.[9]

The Government Agents and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. ER 5/8:T8:13.[10] The Bergers were never advised that the Media had entered the Ranch with the aid of the Government Agents and were conducting a private search by videotaping and recording the search on the Bergers' land and in the various buildings. ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T8:13. The Bergers believed that the Media were Government Agents as they dressed in "street" clothes like the Government Agents and were thus indistinguishable from the law enforcement personnel. ER 4:¶¶11-12; ER 5/8:T6:3. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents

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[8] The Bergers contend that Agent Scrafford neither requested nor received permission from them to enter their residence. ER 3:¶¶45-46; ER 4:¶¶5-6; 5/7:115:7-116:4. The entry was well after Mr. Berger had been informed that every structure on his ranch was covered by the search warrant and that he would be imprisoned if he did not cooperate.

[9] Mrs. Berger was in the house. At the time, she was 81 years old and also recently hospitalized in ill health. ER 4:¶17.

[10] Hamann is depicted on the videotape of the pre-search briefing soliciting and discussing with the Government Agents alternative ways to avoid detection of the Media by the Bergers. These scenes were omitted from the written transcript provided by the Media. ER 5/8. The Bergers offered the videotapes to the District Court by way of judicial notice under Fed. R. Evid. 201.

Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. ER 4:¶¶5, 10; ER 8/8:T8:13.

Government Agents helped the Media set-up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search. ER 5/5, 5/2, 5/8:T11:2-8.[11] Many intrusive outtakes of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Government Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." ER 5/2, 5/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles.

Government Agents also helped the Media produce and promote the program. AUSA McLean breached his duties when he met with the Media numerous times during his confidential investigation and made confidential disclosures on-camera with Hamann in an effort to do his "bit" for the environment. ER 1:¶¶35-44, 51-54, 74, 75; ER 5/8:T11:7-8. In addition, a few days before Mr. Berger's sentencing on the misdemeanor count, Agent Hanlon sent a letter on official Government stationery to "[a]ll participants in the Paul Berger (INV.4506A0) eagle poisoning investigations" announcing the broadcast schedule for the "Ring of Death" on Turner and CNN programs, "Earth Matters" and "Network Earth":

> the Paul Bergers and non-believers of the world will have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD. . . . Japan, Chile, France, and every place in between.

ER 5/10. CNN and Turner channels broadcast the segment nationally and internationally at least ten (10) times through

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[11] The outtakes included on-camera interviews of Government Agents made at the Berger Ranch. During one lengthy interview, AUSA McLean made disparaging personal remarks about Mr. Berger.

April 1994. ER 5/8T12:1-3; 5/9:4. It may still be being broadcast somewhere in the world today.

B. Basis for Federal Jurisdiction Below

The Bergers filed two related civil actions against the Media and Government Agents in the United States District Court in Montana for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§ 2510, *et seq.*), state common law (trespass, conversion and intentional infliction of emotional distress), declaratory and injunctive relief and monetary damages.[12] On February 26, 1996, the District Court dismissed all counts. District Court jurisdiction was pursuant to 28 U.S.C. §§ 1331 and 1367(a).

The Bergers' Notice of Appeal was timely filed on March 5, 1996, conferring jurisdiction on the Court of Appeals under 28 U.S.C. § 1291. As to the question presented here and for the reasons discussed below, the Ninth Circuit held that the Bergers' rights were violated by the Media-Government foray onto their private Ranch. In sum, the Ninth Circuit reversed the District Court and held that the Media's conduct with the Government Agents was "state action" for purposes of constitutional liability under this Court's "joint action" test. App. 19a. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). The Ninth Circuit decision was based on a factual determination that the Media and Government Agents formed a conspiracy and engaged "jointly in an enterprise that only the government could lawfully institute – the execution of a search warrant – for the mutual benefit of both the private interests of the media and the government officials' interest in publicity." App. 18a-19a.

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[12] The Bergers initially sued CNN and Hamann on March 24, 1994, filed the First Amended Complaint in March 1995 and the Second Amended Complaint ("Complaint") on May 19, 1995. The Complaint against the Government Agents (which also named Media defendants Turner, Rainey and Hooper) was filed on March 21, 1995 and amended on May 16, 1995.

The Ninth Circuit also declared that the Media were not mere "passive observers" as they prefer to characterize themselves. The Court of Appeals observed that the press in the older, lower court decisions relied on by the Media were different from the "active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." App. 13a. "In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the Media that occurred in this case." App. 12a. *See Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g*, *Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994).

Coupled with finding that the Media were state actors, the Ninth Circuit ruled that the Bergers' Fourth Amendment rights were violated, leaving the Media open for liability because,

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

App. 9a-10a.[13]

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[13] In holding that the "invited informer" doctrine did not apply, the Ninth Circuit ruled that the Media's use of the hidden microphone was unlawful eavesdropping and violated the Bergers' privacy "because the surreptitious recording was not done for a legitimate law enforcement purpose." App. 15a.

The Ninth Circuit also ruled that the Government Agents were not protected by qualified immunity from liability because they permitted the Media to join the search party, observing that,

> no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

App. 11a-12a. *See Ayeni v. Mottola*, 35 F.3d at 682-84.

REASONS WHY THE MEDIA'S WRIT SHOULD NOT BE GRANTED

Review of "state action" is unwarranted because the Ninth Circuit's decision applies settled law in a fact-specific determination of a particular case and is not in conflict with the decisions of this Court or the courts of appeals. The Media rely on cases in which "state action" was not found based on a total lack of evidence of state action or one single act, but they cannot refute the aggregate of facts here. While there are several fact-based tests to determine "state action", the Media's selected tests do not apply to the facts presented. CNN/P 12-13 (citing, for example, *see Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (government coercion); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 411-12 (1995) (O'Connor, J., dissenting) (state influence or coercion); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 196 (1988) (mere approval of or acquiescence)). The real issue here is that the Media disagree with the result rendered by the Ninth Circuit, not the law.

Review is clearly unwarranted on the Petition of the Media on the issue of whether law enforcement violates the Fourth Amendment when it permits the media to join a search. That issue does not concern the Media. The courts affirmed that in *March 1992* – one year *before* the Berger search in March 1993 – that the law was already "clearly established" that federal agents violated the Fourth Amendment when they brought onto private property "persons who

were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there." *Ayeni v. Mottola*, 35 F.3d. at 685 (Secret Service brought CBS camera crew); *see Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (police allowed company employee to search for stolen company goods). The real issue is whether the Media violated the Bergers' Fourth Amendment rights when the Media planned, joined and participated in the Government Agents' search of the Berger Ranch under the cloak of, but without any authority under the search warrant.

I. THE NINTH CIRCUIT'S HOLDING THAT THE MEDIA WERE STATE ACTORS WHEN THEY JOINTLY AND ACTIVELY PARTICIPATED WITH GOVERNMENT AGENTS UNDER A CONTRACT TO CONFER MUTUAL BENEFITS IS CONSISTENT WITH EXISTING LEGAL PRECEDENT

The Media assert that the Ninth Circuit ignored the law applicable to determining "state action."[14] Their argument is that entering private property for reasons independent of the Government Agents' motive to execute a search warrant absolves them of any responsibility even if the Government Agents are liable. CNN/P 8-16. The Ninth Circuit opinion shows why the Media are wrong, as it applied the law that makes private parties liable for their actions, not motives, when conducted jointly with Government Agents.[15]

This Court, the Ninth Circuit and other courts of appeal have long recognized that liability under *Bivens* for violating

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[14] References to "state action" encompass actions "under color" of federal law. *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

[15] The Media rely on "state action" tests which are inapposite as they do not apply to the facts and circumstances. CNN/P 12-13 (citing, for example, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) and *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 411-12 (government coercion)). These cases were mentioned by the Ninth Circuit only to illustrate the four tests.

Fourth Amendment rights extends to private parties who (1) engage in "state action" "under color" of federal law, and (2) deprive plaintiffs of rights secured by the Constitution or federal statutes. *See Bivens*, 403 U.S. at 392-98; *Ginn v. Mathews*, 533 F.2d 477, 478-488 n.4 (9th Cir. 1976) (the law of the Ninth Circuit is that status as a private corporation cannot defeat *Bivens* liability where the defendant has engaged in "state" action under color of law); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989); *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984).

There is "no specific formula for defining state action." *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) (citing *Melara v. Kennedy*, 541 F.2d 802, 805 (9th Cir. 1976)). The "existence of governmental action is a question of fact." *See Howerton*, 708 F.2d at 383; *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State with private conduct be attributed its true significance."); *accord*, *Life Ins. Co. v. Reichardt*, 591 F.2d 499, 501 (9th Cir. 1979). Here, the Ninth Circuit's decision was properly based on an analysis of an abundance of facts under the "joint action" test.

A. THE MEDIA'S PRIVATE MOTIVE DOES NOT EXEMPT THEIR JOINT ACTIONS WITH THE GOVERNMENT AGENTS FROM BEING STATE ACTION

The Media assert that because their motive for joining the Berger search was independent of the Government Agents' motive, their conduct is not actionable on constitutional grounds. CNN/P 10-16. Courts have long recognized, however, that private motive alone does not preclude finding that a private party engaged in "state action." *See United States v. Cleaveland*, 38 F.3d 1092, 1094 (9th Cir. 1994) (the mere existence of a legitimate, private motive does not immunize a search from scrutiny where the government's participation with a private party can be "so extensive as to trigger

Fourth Amendment scrutiny").[16] The key to determining this issue is to examine the facts evidencing the relationship between the Government Agents and private party. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-943 (1982) (necessity of private creditor to execute writ of attachment required no more than invoking "joint participation" of sheriff);[17] *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (private co-conspirators were "willful participant" state actors under 42 U.S.C. § 1983 for bribing a judge to enter an injunction).

While the Media's motive alone was not relevant to the Ninth Circuit's analysis, the Media's conduct was dispositive.[18] Applying the "joint action" test, the Ninth Circuit found the test satisfied and this "Court has said [the test] is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a Government actor and a private party [citation omitted]." App. 18a. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970) (state action is established under the "joint action" test upon showing that the private party was "a *willful* participant in joint action with the State

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[16] The power company in *Cleaveland* did not engage in "state action" when an employee went to read a meter at the home of a suspected power thief and asked a police officer to watch him from the street to ensure his safety. *Id.*

[17] The dissent in *Lugar* challenged this Court's decision based on the "joint participation" theory arguing that there can be no state action where the state is not responsible for the private decision to behave in a certain way, or where the initiative to act comes from the private party and not the state. *Id.* at 949-50. That is not what occurred here. Although the Media initiated first contact, the Government Agents were responsible for permitting the Media to join and took the initiative to arrange access to the Berger property as part of the search party.

[18] The Ninth Circuit properly ruled that the district court was wrong when it concluded that the Media did not act "under color" of law because their cameras were at the Berger Ranch as a means of furthering their own interests. App. 17a-21a.

or its agents [citation omitted].");[19] *see Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); *Ginn v. Mathews*, 533 F.2d 477 (9th Cir. 1976). The Court of Appeals noted that,

> [i]n this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute – the execution of a search warrant – for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation. This satisfies the joint action test.

App. 19a.

The Media's reliance on *Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997), does not support their purported private motive excuse. The majority of the Eighth Circuit panel in *Parker v. Boyer* did not conduct any state action analysis. It appears to have relied on the underlying district court opinion, *Parker v. Clarke*, 905 F.Supp. 638 (E.D. Mo. 1995), *aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997), in which the district court failed to find that the media engaged in state action because there was no allegation that the media acted in accordance with any state rule of conduct and because the court found no evidence of

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[19] Proof of joint action establishes both state action and action under color of law. *Howerton*, 783 F.2d at 383 n.6 (citing *Adickes*, 398 U.S. at 152).

"any affirmative agreement" between the media and police. *Id.* at 642. In contrast, the Bergers alleged in their complaint that the Media acted under the cloak of the Government Agents' official warrant authority and the evidence is undisputed that the Media executed the written Agreement with the Government Agents. Consequently, it was not private motive alone that absolved the media in *Parker v. Boyer* from engaging in state action, it was the insufficiency of evidence and pleading.[20]

Other cases cited by the Media are factually inapposite. State action was not found in those cases because there was insufficient evidence to show a legally cognizable relationship between the private party and the Government Agents. For example, there was no evidence of any "exceptional circumstances" in *Jones v. Taibbi*, 508 F.Supp. 1069 (D. Mass. 1981), sufficient to find that the defendant reporter engaged in state action because his agreement with the police was only to refrain from broadcasting a story about a murder suspect so that he could later cover the arrest. *Id.* at 1073. The defendant there was not, as here, a "willful participant" in any planning or pre-search briefing, he did not hide a microphone and videocamera, and he did not participate in any search. Similarly, the defendant wife of the sheriff in a town of 300 in *Price v. Baker*, 693 F.2d 952 (10th Cir. 1982), was not a state actor when, while sitting in her husband's squad car only as a companion, she hit the plaintiff who climbed into the back seat while fighting with another bar brawler as the sheriff was

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[20] Had the Eighth Circuit in *Parker v. Boyer* conducted the appropriate analysis it would have found, as the dissent pointed out, that the defendant news crew "acted in concert with the police" as "willful participant[s]" insofar as they contacted the police and solicited an invitation to join the police, were invited by a police sergeant and "came to the location with the police [in the police car] and could not have entered if the police had not done so first." *Id.* at 449. The police chief even testified that the media's conduct was unlawful where allowing the press to join a police search would constitute a trespass. *Id.* at 447. Even if there was a full inquiry, the *Parker v. Boyer* case is factually dissimilar based on the amount of evidence presented here.

occupied outside, because the sheriff did not direct her to act and she was not a willful participant in a joint activity with her husband. *Id.* at 953-54.[21]

Indeed, the proposition cited by the Media in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), that state action occurs with "governmental compulsion or significant encouragement" (CNN/P 13), is precisely what took place here. *Id.* at 547-48. By government compulsion as against the Bergers, the Media entered the Bergers' private property and by significant encouragement from the Government Agents, the Media conducted their own private search by video and audio recording.[22] *See United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir. 1989) (citing *Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983)) (evidence that employer cooperated with police and actively encouraged them to arrest strikers defeated summary judgment in civil rights action); *see Howerton*, 708 F.2d at 384 (private landlords were state actors and violated § 1983 when they asked police to accompany them at every step of eviction proceeding and officer went to the property on his own); *see also Anderson v. WROC-TV*, 441 N.Y.2d 220, 226 (1981) (stating in a case in which the media was sued for trespass, that "[i]f the media were to succeed in compelling an uninvited and

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[21] The record in *Russ v. Ratliff*, 538 F.2d 799, 805 (8th Cir. 1976), was simply "barren of showing any unlawful or negligent conduct on Draper's part in the events leading up to the death of Russ." The plaintiff in *Freedman v. Coppola*, 614 N.Y.S.2d 833 (N.Y. App. Div. 1994), failed to demonstrate the existence of a triable question of fact on the issue of conspiracy.

[22] Otherwise, the case is irrelevant where the USOC obtained an injunction to preclude use of the word "Olympic" by another private entity but did not engage in conduct with any Government Agents. Reliance on *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) is also inapposite. There, the state university's state actor status was not imputed to the NCAA because they were antagonists, not joint participants, in investigating the coach, and the rules the NCAA sought to impose were not state law but created by its collective membership. *Id.* at 196 n.16.

nonpermitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists").

The Ninth Circuit correctly analyzed the facts and the law in holding that under the "joint action" test the Media were engaged in state action. There is no conflict among the courts of appeals that "state action" exists here.

B. THE MEDIA'S CONTRACT AND JOINT ACTIVITIES WITH THE GOVERNMENT AGENTS CONSTITUTE STATE ACTION BY CONSPIRACY

The Media condemn the Ninth Circuit's decision under the "joint action" test as "far too sweeping" because their "letter agreement" with the Government Agents and "attendance" at the pre-search briefing where Government Agents "shared" confidential information are insufficient to show evidence of a "corrupt conspiracy." CNN/P 16-21. While the Media rely on cases where these elements individually were insufficient to find "state action," those cases are inapposite where, as here, the evidence in the aggregate shows conduct supporting shared, common unconstitutional goals. The Ninth Circuit correctly understood this distinction in rendering its decision on the "state action" issue.

This Court and the Ninth Circuit have long recognized that a conspiracy is proof of "state action." *see Howerton*, 708 F.2d at 383 (citing *Adickes*, 398 U.S. at 153) (where a private party and government official "somehow reached an understanding to deny" a constitutional right, "such a conspiracy plainly provides the state action essential to show a direct violation . . . of rights, whether or not the actions of the police were officially authorized, or lawful [citations omitted]."). "It is enough that [the private party] is a willful participant in joint activity with the State or its agents." *Adickes*, 398 U.S. at 153 (citing *United States v. Price*, 383 U.S. 787, 794 (1966)); *see Callanan v. United States*, 364 U.S. 587 (1961); *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1343 (9th Cir. 1990) (civil conspiracy is a combination of two or

more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means).

1. The Contract Memorialized the Conspiracy

In rendering its decision in this case, the Ninth Circuit was not required to find that the conspiracy was "corrupt," but only that it existed. App. 18a-19a. The common unconstitutional goal was to violate the Bergers' Fourth Amendment rights to privacy and protection against unreasonable search and seizure.

The Ninth Circuit correctly considered the evidence in the aggregate showing the requisite "meeting of the minds" and "willful participation" which included: (1) the Media's knowledge that the Berger Ranch was private property (ER 5/2); (2) the Media's request to enter the Berger Ranch under federal search warrant authority; (3) the Agreement; (4) that the Government Agents knew or should have known that clearly established constitutional law prohibited private parties during searches unless necessary and authorized by the search warrant (Agent Scrafford's remarkable testimony that he advised the Media they could not legally enter the Berger Ranch under the warrant (ER 5/7:37:2-13)); (5) the Agreement was copied to the Media's in-house counsel (ER 5/7); (6) the Media agreed not to broadcast outtakes of the search until after Mr. Berger's criminal trial, implying they knew his constitutional rights were jeopardized by their conduct (ER 1/1; 5/1); (7) the Media participated in the pre-search briefing and obtained confidential information; (8) Agent Scrafford wore a hidden Media microphone; (9) the Media's camera was mounted on a Government vehicle; (10) the Media trespassed onto the Berger Ranch and with the Government Agents' help, videotaped and recorded the Bergers' private images (in the house, outside on the property and in outbuildings), and converted these outtakes for commercial use; (11) the Media provided publicity for AUSA McLean and the Government Agents by repeated broadcasts; (12) the Media and Government Agents worked together to deflect detection of the

Media by the Bergers including Hamann's diversion of the camera after discovery by Mr. Berger while Government Agents diverted Mr. Bergers' attention; and (13) AUSA McLean's on-camera interview; and (14) Fish and Wildlife's use of official stationery to announce and endorse the CNN broadcast. The Media were not passive observers. (ER 1:¶¶34-78, 82, 83; ER 2:¶¶1, 2/A, 8; ER 5/2).

2. The Joint Activities Were Mutually Beneficial

The cases cited by the Media to rebut the Ninth Circuit's finding that the existence of the contract was dispositive of the conspiracy only serve to underscore that in this case the Media engaged in state action because of their deep relationship with the Government Agents. In cases cited by the Media, there was no "state action" because there was simply no evidence that the private defendant shared a common, unconstitutional goal with the state. CNN/P 19. *See Cunningham v. Southlake Center for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991) (no evidence of knowledge by county jail employees of private contractor's alleged reason for firing employee from jail counseling job); *Collyer v. Darling*, 98 F.3d 211 (6th Cir. 1996) (no evidence of shared unconstitutional goal between private psychiatrist and state clinic under one-time contract to examine plaintiff-former employee's mental state); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1450 (10th Cir. 1995) (no evidence that state university influenced policy or execution of pat-down searches by private security company under contract at private concert held in 1991 at the university center); *Simescu v. Emmet County Dept. of Social Services*, 942 F.2d 372, 375 (6th Cir. 1991) (no evidence of state coercion or encouragement to private daycare center to hire welfare recipients where contract with state gave daycare center right to select or reject workers).

3. The Information Was Not Publicly Available

The Media assert that to hold them as "joint actors" because they obtained "confidential information from the

Government" is "antithetical to the historic and constitutionally protected role of the news media." CNN/P 10-21. This Court has long recognized, however, that the Media have no "constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Here, the Media not only obtained non-public information *from* the Government Agents, they also seized information, sound recordings and photographic images *with* the cooperation and assistance of the Government Agents on private property. It is the Media's conduct that is antithetical to the historic and constitutionally protected rights of individuals. Under these circumstances, the First Amendment cannot be exploited as a defensive tactic. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("[t]he extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights reasonably – a duty widely acknowledged but not always observed by editors and publishers").[23]

The Media obtained confidential information from the Government Agents and from the Bergers under a sealed search warrant during a confidential criminal investigation. In return, the Media publicized the Government Agents' law enforcement efforts. Joint efforts conferred mutual benefits. This was unlawful conduct. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1215-1216 (9th Cir. 1989) (denying press access to search warrant materials because disclosure would jeopardize the criminal investigation and pose a grave risk to the targeted individual's privacy); *see also United States v. Capra*, 501 F.2d 267, 279 (2d Cir. 1974) (admonishing law enforcement to forbid press from pre-arrest briefings).[24] The facts of this case simply show that the Media's

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[23] While this Court refused to prioritize First and Sixth Amendment rights in *Nebraska*, the Fourth Amendment should be protected here over economic interests hiding behind the First Amendment. *Id.* at 562.

[24] Government Agents' disclosure was also prohibited by the Department of Justice ("DOJ") and the Privacy Act, and punishable by

reliance on cases involving information available to the public is unavailing.[25] Other cases relied on by the Media are equally inapposite as there was no evidence found to support "state action."[26] CNN/P 20. In light of the foregoing, the Agreement coupled with the totality of the facts, clearly establish a conspiracy and state action. *See Callanan*, 364 U.S. at 587; *Vieux*, 908 F.2d at 1343; *see also United States v. Shabani*, 513 U.S. 10, 12 (1994) (overt act not required for common law conspiracy); *cf. State v. Houchin*, 765 P.2d 178,

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criminal sanctions. *See* 5 U.S.C. § 552a (disclosure under the Privacy Act required the Bergers' written consent or court order). The DOJ specifically *prohibits the release of information to the media by DOJ personnel*, during an investigation, particularly "subjective observations" about the character of persons under investigation, or reference to investigative procedures, witnesses or evidence, or any opinion as to the person's guilt, where release "tends to create dangers of prejudice without serving any law enforcement function." *The prohibition is absolute* where disclosure "could reasonably be expected to be disseminated by means of public communication. . . . " 28 C.F.R. § 50.2(b)(1)-(6); *see Department of Justice Manual* ("DOJ Manual"), 1-7.001 at 1-285 (1990-1 Supp.); 1-7.000 (1993 Supp.) ("favoritism should be shown to no member of the media").

[25] Cases cited by the Media are inapposite because they did not arise on private property and the information obtained from the Government Agents was neither sealed nor confidential. *See Brooks v. American Broadcasting Cos.*, 737 F.Supp. 431, 435, 437-40, (N.D. Oh. 1990) (no "state action" where government not involved and media interview of plaintiff was on public street based on public indictment); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) (case remanded for lack of evidence on "state action" issue).

[26] *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984) (no evidence of "state action" shown by plaintiff who also failed to refute affidavit on summary judgment that press acted professionally and not in conspiracy); *Pino v. Higgs*, 75 F.3d 1461, 1465 (10th Cir. 1996) (no evidence that private therapist exercised "some right or privilege" or acted under a "rule of conduct" created by the state); *Lowe v. Aldridge*, 958 F.2d 1565, 1573 (11th Cir. 1992) (no evidence and no allegation that private therapist involved in procuring search warrant upon which constitutional violation was claimed).

179 (Mont. 1988) (Montana Code Annotated § 45-4-102, requires showing of overt act).

C. THE MEDIA CANNOT WIELD THE FIRST AMENDMENT AS A SWORD TO EXPLOIT THE GOVERNMENT AGENTS AND PRIVATE PERSONS

The Media argue that because they are "institutionally autonomous" from the Government, the Government Agents are obligated constitutionally to respect their independence and, therefore, they cannot be "state actors". CNN/P 21. In other words, the Media believe that they are above reproach for employing unlawful methods to obtain information and that any wrongdoing is the fault of the Government Agents. Apparently, the Media conclude that they, unlike anyone else, cannot commit a crime. This conclusion defies logic. The Media also assert that to hold a broadcaster a "state actor" would be inimical to the First Amendment. CNN/P 21. In fact, *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 140 (1973), made clear that an analysis of the facts is required when, "[i]n dealing with the broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority." *Id.* at 116.[27]

The Media simply ignore the facts because to address the facts in the aggregate would be an admission of "state action." Thus, to justify their presence on the Berger Ranch, the Media invoke as their mantra, this Court's recognition in *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971), that the intent of the First Amendment is to protect the press to "bare the secrets of the government and inform the people." CNN/P 19. What the Media ignore is that in the

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[27] In that case, a broadcast licensee's refusal to accept a paid editorial advertisement was not "state action" because the Federal Communications Commission was not involved in the licensee's policy on the issue. *Id.* at 119.

same paragraph, this Court reminded them that the intent of that First Amendment protection is only to allow the press "to serve the governed, not the governors." *Id.*[28]

Here, the Media's conduct was contrary to the intent of the First Amendment where they served the Government Agent "governors" to bare the secrets of the Bergers, the "governed", for the mutual benefit of the Government and the Media in violation of the Bergers' Fourth Amendment rights. ER 5/1, 5/2, 5/8:T11:7-8. By remanding the Bergers' state law claims for trespass and infliction of emotional distress, the Ninth Circuit recognized that the press in general, and the Media in particular, cannot break the law in newsgathering. App. 22a-25a. Op.516-17.

The First Amendment has never been held to preempt the Fourth Amendment and "is not a license to trespass, steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *see Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973) (crimes and torts committed to gather news are not constitutionally protected because "[t]here is no threat to a free press in requiring its agents to act within the law"). The Media's reliance on early "state action" cases involving the press is inapposite and irrelevant where, for example, the newspapers in *Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), were not "state actors" for simply doing their job in refusing to print the plaintiff union's editorial advertising because they never consented to offer unrestricted access to advertising space and never assumed to provide a public function to every member of the general public. *Id.* at 475.[29] There was no

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[28] Contrary to the Media's purpose for citing *Polk County v. Dodson*, 454 U.S. 312 (1981), their multi-faceted role in society is not analogous to a state employed public defender, whose sole purpose is to act as an independent adversary of the state. *Id.* at 318. Again the Media miss the point that a public defender serves the "governed" not the "governors."

[29] For the same reasons the newspaper was not a "state actor" in *Resident Participation of Denver, Inc. v. Love*, 322 F.Supp. 1100 (D. Colo.

newspaper "state action" in *Mimms v. Philadelphia Newspapers, Inc.*, 352 F.Supp. 862 (E.D. Pa. 1972), because the court erroneously did not recognize a federal right to privacy. Superseding decisions by this Court recognize a federal privacy right under the Fourth Amendment. *See Winston v. Lee*, 470 U.S. 753, 758-762 (1985); *see also Soldal v. Cook County*, 506 U.S. 56 (1992).

D. THE MEDIA CANNOT WIELD THE FIRST AMENDMENT AS A SHIELD FROM LIABILITY FOR UNLAWFUL CONDUCT

The Media argue that the Ninth Circuit's decision holding them "state actors" jeopardizes their First Amendment right to serve as "watch dog" of the Government and to report on matters of public concern. CCN/P 23-25. The only examples the Media mention where they may be engaged with Government Agents in joint planning and participation for newsgathering purposes, however, involve *public* situations (*e.g.*, access to crime scenes, government buildings and press conferences). CNN/P 24. The Ninth Circuit decision does not create a conflict among the courts of appeals; it reaffirms legal precedent that the Media cannot engage in unlawful activities when gathering information.

This Court has long recognized that the First Amendment does not grant the press immunity from the application of "general laws." *Branzburg*, 408 U.S. at 683; *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its

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1971). Plaintiffs did not allege that any newspaper was a "lackey of the city or state administration or in any other way in the grip of official power"; the First Amendment does not prohibit newspapers from refusing advertisements. *Id.* at 1105. Student editors of a high school newspaper and annual were not "state actors" in *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2060 (1998) (en banc); they had a policy of refusing to publish political or advocacy advertising and their decision was independent of school officials. *Id.* at 242-43, 253-55.

ability to gather and report the news"). Further, the Ninth Circuit focuses on the method of newsgathering and has held that the First Amendment does not protect the news media from "calculated misdeeds." *Dietemann*, 449 F.2d at 249-50 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9, 389-90 (1967)).[30] According to the Ninth Circuit in *Dietemann*,

> The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

Id. at 249.

The Second Circuit, as well, has held that "[t]here is no scope to the First Amendment right. Crimes and torts committed in newsgathering are not protected." *Galella*, 487 F.2d at 995;[31] *Ayeni v. CBS Inc.*, 848 F.Supp. at 368 (media's motion to dismiss trespass claim denied because qualified immunity inapplicable to private parties engaged in "state action" and where Secret Service agent exceeded scope of search warrant in violation of Fourth Amendment); *see also Prahl v. Brosamle*, 295 N.W.2d 768, 780-81 (1980) (no First Amendment privilege to trespass); *Le Mistral, Inc. v. CBS Inc.*, 402 N.Y.S.2d 815, 817 (1978) (no First Amendment balancing required to find that media camera crew committed trespass in restaurant); *Miller v. National Broadcasting Co.*, 187

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[30] In *Dietemann*, two *Life* magazine employees, acting in concert with law enforcement, used false identities to gain access into plaintiff's home/office where they surreptitiously videotaped and recorded "evidence" that plaintiff was a "quack." *Id.* at 249-50. The Ninth Circuit noted that the First Amendment protections covering publication are "not relevant in determining liability for intrusive conduct antedating publication." *Id.*

[31] The court of appeal affirmed a restraining order and refused to extend a First Amendment privilege to a photographer who "intrusively" and in a "harassing manner" attempted to photograph Mrs. Onassis and her family. *Id.* at 993.

Cal.App.3d 1463, 1482-88 (1986) (camera crew invaded privacy by entering home with paramedics to film plaintiff's dying husband without her consent).[32]

United States District Judge Jack Weinstein put the issue here in perspective in noting that,

> While the First Amendment provides the press with a shield from censorship, the press may not use this protection to justify otherwise illegal actions.

United States v. Sanusi, 813 F.Supp. 149, 155 (E.D.N.Y. 1992) (criminal case underlying the *Ayeni* opinions).[33]

II. THE NINTH CIRCUIT'S HOLDING THAT THE MEDIA VIOLATED THE FOURTH AMENDMENT BY JOINING THE GOVERNMENT AGENTS FOR PRIVATE PURPOSES IS CONSISTENT WITH LEGAL PRECEDENT

It is well settled that the Fourth Amendment limits law enforcement authority to invade a person's privacy to execute a search warrant. *Katz v. United States*, 389 U.S. 347, 356-57 (1967). It is equally well settled that an officer executing a warrant is limited to actions expressly authorized by the warrant. *See Bivens*, 403 U.S. at 394 n.7; *See also Michigan v.*

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[32] Other cases where the press was excused do not apply to the facts here. *Cf. Baugh v. CBS Inc.*, 828 F.Supp. 745, 750 (N.D. Cal. 1993) (plaintiff's consent to entry by media with crisis intervention team vitiated claim for trespass and intrusion under California law); *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976) (news photographer asked by fire fighters to assist investigation by photographing gruesome scene in plaintiff's house excused by Florida custom and usage doctrine to use media in emergencies), *cert. denied*, 431 U.S. 930 (1977).

[33] Even cases cited by the Media recognize that, at a minimum, they committed *trespass*. *See Parker v. Boyer*, 93 F.3d at 447 (police chief testified that allowing press to join search in violation of policy would be trespass); *Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) (General Motors' security guard trespassed to take photographs independent of search party).

Summers, 452 U.S. 692, 705 (1981) (actions implicitly authorized by a warrant are limited to those reasonable to advance a legitimate law enforcement purpose relating to the warrant or the officer's safety); *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) (actions reasonably necessary to effectuate the warrant's purpose). Federal statutes also limit the presence of private parties during searches unless specifically authorized under the warrant to serve law enforcement purposes. *See* 18 U.S.C. § 3105.[34] *See Ayeni v. Mottola*, 35 F.3d at 680; *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980) (telephone company employees asked to identify equipment during search); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982) (state drug enforcement officer asked to assist in execution of federal drug search warrant).

The search warrant here did not authorize the Government Agents to bring the Media, or to video or audiotape the search and the Bergers for commercial purposes. The Second Circuit in *Ayeni v. Mottola*, 35 F.3d at 685, concluded that,

> The unreasonableness of . . . [this] conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but *it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right to privacy* . . . .

The Media's joint actions with the Government Agents not only violated federal statutes proscribing unauthorized private participation during searches, the Media's conduct violated case law circumscribing government actions under a

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[34] Section 3105 limits who may serve a search warrant and is one of several statutes restricting the execution of warrants. *See* 18 U.S.C. §§ 2234 (criminalizes willfully exceeding authority under a search warrant); 2236 (criminalizes a warrantless search of a private dwelling); and 3109 (limits the circumstances law enforcement can use force to enter a private dwelling); Fed. R. Crim. P. 41 regulates the issuance and execution of search warrants.

warrant.[35] There is no dispute that the Media were not named in the search warrant and were not on the Berger Ranch to *assist* in its execution. ER 5/4, 5/5.[36] Thus, the Ninth Circuit correctly found that the Media's presence, actions and use of the Government Agents did constitute "participation" in the execution of the warrant. The Media did not play "a passive role". App. 13a. The Ninth Circuit correctly distinguished the older, unpublished lower court cases relied on by the Media because in those cases the Court failed to recognize the people's right to privacy under the Fourth Amendment. App. 12a.[37] According to the Media's view, prisoners have

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[35] *Id.*, citing *Michigan v. Summers*, 452 U.S. 692 (1981) (detaining occupants while search in progress if for reasonable law enforcement purpose); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985) (officers cannot flagrantly disregard terms of the warrant); *see also Marron v. United States*, 275 U.S. 192, 195 (1927) (warrant must particularly describe items to be seized to minimize interruption of privacy); *Bills*, 958 F.2d at 704 (law enforcement have "fiduciary" obligation to resident only to take actions reasonably necessary to execute the warrant); *United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991) (search may not be unreasonably destructive of property).

[36] The Media's actions including the illegal taking of images and statements, further violated case law which limits seizures under a warrant to the items described in the warrant or items in plain view that are obviously connected to the crime under investigation. *See United States v. Juichang Chen*, 979 F.2d 714, 717-719 (9th Cir. 1992) (where government installed three surveillance cameras and warrant authorized only one, evidence from two of the cameras was suppressed).

[37] *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Ca. 1980) and *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Oh. 1984). These cases were relied on by the district court in *Berger* to find that the Media's presence was not unlawful. App. 12a. *Moncrief*, however, erroneously held that a constitutional wrong required violation of a *non*-4th Amendment privacy right (*e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973)); *Higbee* turned on a restrictive characterization of the privacy right violated by the intrusion of the media under a warrant. Superseding decisions by this Court confirm that a privacy right exists under the *Fourth Amendment* and clearly invalidate these erroneous decisions. *See Winston*, 470 U.S. at 758-762; *see also Soldal*, 506 U.S. at 64.

more privacy rights than plaintiffs. *See Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).[38]

CONCLUSION

When the Media execute a written contract with Government Agents, trespass on private property, use Government Agents to perform and stage video and audio recordings of the search of private property, and install a hidden microphone on a Government Agent to surreptitiously obtain private sound bites inside a private home excluded from the search warrant, the Media are engaged in "state action." For the reasons set forth in this opposition, the Bergers respectfully submit the Media's Petition for Writ of Certiorari should be denied. Alternatively, the Bergers submit that if the Media's Petition is granted, that their Conditional Cross-Petition be granted as well.

Respectfully submitted,

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[38] As this Court observed in *Houchins*, "[i]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not animals in a zoo to be filmed and photographed at will by the public or by media reports, however 'educational' the process may be for others." *Id.* at 5 n.2 (plurality opinion).